INDEX

CITATIONS

759-601—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The oral opinion of the district court (Appendix A, *infra*, pp. 1a–11a) and its findings of fact and conclusions of law (Appendix B, *infra*, pp. 12a–43a) are not reported.

JURISDICTION

The final judgment of the district court was entered on September 14, 1964 (Appendix C, *infra*, p. 44a). The notice of appeal was filed on November 12, 1964. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11,

1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29; *United States* v. *Loew's Inc.*, 371 U.S. 38.

QUESTION PRESENTED

Whether an arrangement between the General Motors Corporation and all its franchised Chevrolet dealers in the Southern California area whereby the latter undertook not to sell new automobiles through discount houses or referral services violated Section 1 of the Sherman Act.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing after trial a government civil antitrust suit against General Motors Corporation ("General Motors") and three trade associations representing all of General Motors' franchised Chevrolet dealers in the Southern California market area (R. 2–3).[1] The complaint (R. 2–9), filed on Au-

[1] The government also filed a companion criminal case based on the same events. That case, which was tried first, resulted in a directed verdict of acquittal. *United States* v. *General Motors Corporation, et al.*, 216 F. Supp. 362 (S.D. Cal.).

gust 30, 1962, alleged that since the summer of 1960 the defendants had engaged in an unlawful combination and conspiracy to induce and persuade Chevrolet dealers to refrain from selling Chevrolet automobiles through discount houses and so-called referral services (R. 6–7).

1. The facts are largely uncontradicted. In 1957 a number of Chevrolet dealers in the Southern California area began selling new Chevrolets through discount houses and referral services at prices much below the usual dealer's price—often for only $165.00 more than the dealer's invoice cost (G.X. 185; see also G.X. 12), a price that many dealers complained they could not meet (see, *e.g.*, G.X. 12, 14, 32, 39, 50). All of the discount and referral services involved in this case were operated by independent third parties (*e.g.*, Appendix A to Reporter's Transcript, pp. 2, 100, 127, 169, 170), who merely leased or rented desk space on the premises of such discount department stores as Federal Employees Distributing Company ("FEDCO") (see G.X. 185) and G.E.M. Stores, Inc. ("GEMCO") (*ibid.*). These discount outlets handled a wide variety of makes and models of new automobiles of different manufacturers, including General Motors (G.X. 12). No banners or signs were displayed on their premises bearing the name of any Chevrolet dealer and no dealer advertised that new Chevrolet automobiles were available through discount houses or referral services (*e.g.*, Appendix A to Reporter's Transcript, pp. 100, 170). New car brochures and other descriptive literature provided by participating dealers frequently were available at the new

car discount desks (Appendix B to Reporter's Transcript, pp. 14–15) and in some instances various models of new automobiles were on display (see, *e.g.*, G.X. 7, 141).

In the case of a referral service, the customer was told that the particular make and model sought could be supplied at a discount, but no price was quoted. He was referred to a participating dealer who quoted the price (Appendix B to Reporter's Transcript, pp. 28–30). In a discount house, however, the customer was quoted a price for the particular model, and he then signed a purchase agreement under which the discount house undertook to supply the car at the stated price (see, *e.g.*, G.X. 138, p. 3). After the agreement was signed, the dealer who would supply the car was identified (see G.X. 141; G.X. 138, p. 2). In all instances the participating dealers transferred title to the new automobile directly to the customer, and paid the referral services or discount houses an amount, agreed upon in advance, that usually was a flat fee for each car sold (see G.X. 146–147, 149–152, 154, 156).

Most of the dealers who engaged in such selling were located in the City of Los Angeles, but much of the selling was done through discount houses in Orange County, an area outside the Los Angeles city limits and in which automobile prices generally were higher than in Los Angeles proper. In 1960 about 2,000 Chevrolets (approximately two percent of the Chevrolets sold in the Los Angeles area) were sold through discount houses and referral services (Tr. 465–466; G.X. 1, pp. 17–18).

In that year a number of dealers who did not make such sales took steps to end the practice. In the summer of 1960, some of the dealer-members of appellee Losor Chevrolet Dealers Association ("Losor") complained about the discount house sales to the Los Angeles Chevrolet Zone Office "and sought to induce General Motors to take some action respecting such selling. The Zone Office personnel at that time informed the complaining dealers and some of the dealers selling through discount houses or referral services that although said personnel considered the practice inimical to the Chevrolet franchise system, they had no authorization from their superiors in Detroit to take any action to stop such selling" (Fdg. 34, App. B, *infra,* pp. 32a–33a).

The dealers then decided to bring the matter to the attention of high level officials of General Motors in Detroit, "asking that something be done regarding this situation" (G.X. 175; Appendix A to Reporter's Transcript, pp. 21–22). At a meeting of appellee Losor on November 10, 1960, the Chevrolet dealers agreed to write letters and send telegrams to such General Motors officials as the President and Vice President and the General Manager and General Sales Manager of the Chevrolet Motor Division. Pursuant to this plan the dealers sent approximately 200 letters and wires to those officials, complaining about the "unfair competition" posed by Chevrolet dealers who supplied new cars for discount house sales, stating that it was "impossible to compete with these people on a price basis" (see, *e.g.,* G.X. 57, 69), and seeking the cooperation and assistance of General Motors in the

dealers' efforts to eliminate discount house selling (see G.X. 65, 83, 86, 90).[2] On December 15, 1960, the officers of the three appellee dealer associations held a joint meeting at which they appointed a committee to find methods of combating discount house selling (G.X. 119). They informed the Los Angeles Chevrolet Zone Office of this action (*ibid.*)

As a result of this campaign, General Motors decided that its Regional Manager for Chevrolet on the Pacific Coast would meet personally with each dealer in the Southern California area known to be selling through discount houses and attempt to "induce" or "persuade" him to discontinue the practice (see Fdg. 36, App. B, *infra,* pp. 33a–34a), by informing him that a discount house "arrangement [would] constitute a violation of the [dealer's] selling agreement" with General Motors (Tr. 535–537). It also decided that the Los Angeles Zone Manager, "together with the City Managers in Los Angeles and the Assistant Zone Manager, [would] divide up and hold personal conferences with all the other dealers in the Zone * * *" (G.X. 201; Tr. 713–716). As a General Motors official explained (G.X. 201): "This was done in order that every dealer with whom the subject was discussed would know that a similar discussion was being held with all other dealers so that if certain dealers should elect to discontinue their cooperation with a discount house, [General

[2] The President of General Motors viewed these communications as indicating that Chevrolet dealers in the Southern California area were conducting a "campaign" to eliminate sales of new Chevrolets through discount houses (Tr. 590, 607).

Motors] might be able to discourage some other dealer who might be solicited from starting the practice." General Motors recognized that unless there were complete cooperation by all Chevrolet dealers in the Southern California area to discontinue or refrain from discount house selling, "it would not have accomplished anything" (Tr. 853).

In advance of such meetings General Motors sent to every dealer in the area a "policy" letter (G.X. 115–118, 121) describing the discount house problem, warning that in some instances sales through discount houses would violate the Chevrolet franchise agreement,[3] and advising that General Motors officials "propose to personally discuss this matter with each of their dealers in those areas where such [discount] activity is reported to exist * * *" (*ibid.*).[4]

"In carrying out the instructions received from the General Motors Central Office, Chevrolet personnel met with each Chevrolet dealer in the Los Angeles Metropolitan Area individually and endeavored to induce and persuade each such dealer to refrain from

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[3] The standard General Motors Chevrolet "Dealer Selling Agreement" (G.X. 1, pp. 93, 94, paras. 11, 6) provides that "[o]nce Dealer is established in facilities and at a location mutually satisfactory to Dealer and Chevrolet, Dealer will not move to or establish a new or different location, branch sales office, branch service station, or place of business including any used car lot or location without the prior written approval of Chevrolet." In the "policy" letter, General Motors suggested that selling new cars through discount houses would amount to the establishment of a "branch location" at the discount house.

[4] Similar policy letters were sent to all other General Motors dealers (including Pontiac, Oldsmobile, Buick and Cadillac) throughout the United States (G.X. 116; Tr. 449–452).

the practice of selling new Chevrolets through discount houses or referral services" (Fdg. 39, App. B, *infra,* p. 35a). A General Motors' Vice-President testified (Tr. 544) that these meetings were carried out on an individual basis "[b]ecause if it were handled on a group basis I suppose we could have been charged with a conspiracy in conspiring with the dealers * * * group to accomplish this discount house referral elimination." Immediately after these meetings, all participation by Chevrolet dealers in discount house selling in the area abruptly ended (see, *e.g.,* Appendix A to Reporter's Transcript, pp. 102, 116, 148, 163).

Although discount house selling was thus terminated, General Motors recognized that "complete correction of the problem [would] require constant scrutiny and follow-up" to prevent its recurrence (G.X. 127). The dealer associations adopted a "policing" arrangement under which they employed a professional "shopper" and investigator who obtained documentary evidence and sometimes tape recordings of occasional discount house sales (Appendix A to Reporter's Transcript, pp. 47–48, 68–69, 202–207). While the court found (Fdg. 41, App. B, *infra,* p. 36a) that this "policing" arrangement was made without the prior knowledge of General Motors, the evidence thus obtained was turned over to the Chevrolet Zone Manager, who on at least seven occasions called in the offending dealer, confronted him with the evidence of his violation of the "agreement" against discount house selling, and asked him if he did not wish to repurchase the car purchased by the shopper-investi-

gator (Appendix A to Reporter's Transcript, pp. 204–207, 149–150, 260–263, 256–258). Each offending dealer did so, often at a financial loss (*id.* at 260–263, 248, 258).

2. The district court held that neither General Motors nor the appellee dealer associations had violated the Sherman Act in eliminating discount house and referral selling of Chevrolets in Southern California. The court ruled that such selling violated the prohibition in the Chevrolet dealer franchise agreements against establishing a "branch location" (see note 3, *supra,* p. 7), because the discount houses and referral services were dealer "outlets" or "locations" (Conclusion of Law 2, App. B, *infra,* p. 40a); that the location restriction itself was valid because it gives each dealer "a 'head start' in a market of sufficient sales potential to provide him a fair profit opportunity,"[5] since if all dealers could establish competing sales outlets in an area which General Motors had found to be adequate to support only one selling outlet, the business of the dealer for that area would be so diluted that he could not stay in business and General Motors "would lose the competitive advantage of having a sales, service and parts facility" in that area (Fdg. 17, App. B, *infra,* p. 24a); that selling through discount houses and referral services "has the same effect" as the establishment of "branch sales offices" (Fdg. 20, App. B, *infra,* p. 26a); that

[5] The court found that although General Motors was justly concerned by the threat to the dealers' "profit opportunity" (Fdg. 17, App. B, *infra,* p. 24a) inherent in discount house operations, it was not concerned about the prices at which Chevrolets were sold (App. A, *infra,* p. 9a; Fdg. 38, App. B, *infra,* p. 35a).

General Motors had "the legal right" to require Chevrolet dealers to refrain from selling through discount houses and referral services "and thus to conform to the provisions of their Dealer Selling Agreements" (Conclusion of Law 3, App. B, *infra*, p. 40a); that in so doing General Motors had "acted independently and unilaterally" and not "jointly or in combination, conspiracy or concert of action" with the dealers or their associations (Conclusion of Law 4, App. B, *infra*, p. 41a); and that since General Motors had the right to bar its dealers from selling through discount houses, the dealers did not act unlawfully in getting together to urge General Motors to exercise that right (App. A, *infra*, p. 10a; Conclusion of Law 5, App. B, *infra*, p. 41a).

THE QUESTION IS SUBSTANTIAL

This antitrust case concerns the legality under Section 1 of the Sherman Act of a successful joint effort by General Motors and its franchised Chevrolet dealers in the Southern California area to eliminate a new form of merchandising in the automobile industry which apparently originated in the Los Angeles area and was "becoming well established in certain other areas of the country, like St. Louis, Kansas City and Washington, D.C." (G.X. 185 [6]).

Until recently, automobiles have been one of the few major consumer items whose distribution has not

[6] G.X. 185 is a General Motors "policy" statement dealing with the "detrimental" "problems raised by the discount house new car merchandising activities" and indicating those sections of the country where discount house selling either had already developed or was expected to develop. See also Tr. 661.

been attempted through discount houses.[7] These price-cutting outlets in a few years have effected a virtual revolution in traditional methods of retail distribution. Today huge discount supermarkets dot the country, offering under a single roof a wide variety of products, in different makes and models, that are sold to the public primarily on the basis of price rather than of service. Protecting the freedom to institute discount house distribution is especially important in the case of automobiles, since they are sold by brand name and small number of manufacturers makes price competition at the retail level particularly significant.

The decision below upheld the joint effort of General Motors and its dealers to end the successful distribution of Chevrolet automobiles through discount houses in an important market. The ground of decision was that in thus eliminating this method of distribution, General Motors was properly enforcing the provision of its dealer franchise agreement prohibiting the establishment of branch locations. The effect of this ruling, if not reversed, would be to enable any automobile manufacturer, by including a similar provision in its franchise agreements, to prevent any distribution of its cars through discount houses; and thus to deny to the automobile buying public the benefit of the type of discount house selling that has been successfully employed for most other major consumer products. The decision not only has far-

[7] We shall use the words "discount houses" to cover both such outlets and referral services.

reaching consequences for the consumer but, as we now show, is an erroneous application of Section 1 of the Sherman Act.

1. As set forth in the Statement, there is no dispute about the basic facts, but only about the proper inferences to be drawn from them. The record shows that a number of Chevrolet dealers in Southern California, displeased that other dealers were selling automobiles through discount houses, attempted to get the local Chevrolet Zone Office to do something about such cut-price selling, but that the officials there explained that "they had no authorization from their superiors in Detroit to take any action to stop such selling"; that these dealers then importuned General Motors officials in Detroit to stop this "unfair competition"; that General Motors' response to this request was to meet individually with every dealer in the area and "induce" or "persuade" him to stop selling through discount houses, making it clear that similar discussions were being held with all the other dealers; and that, following such meetings, all Chevrolet dealers in the area suddenly and immediately stopped selling through discount houses (*supra,* pp. 6–8). In short, as a result of the joint efforts by some of the dealers and General Motors, all of the dealers undertook to stop trading with the discount houses.

We submit that in the present case, just as in *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 44, the uncontradicted facts establish that the manufacturer "has put together a combination [with its dealers] in violation of the Sherman Act." The dealers

took the initiative in getting General Motors to act, but once General Motors decided to stop discount-house selling it "sought assurances of compliance [from its dealers] and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the [dealers] that [General Motors] was able to gain adherence to its policy" (*id.* at 46–47). Moreover, in gaining dealer adherence to its policy, General Motors made it clear to each individual dealer that all were joining in the program (cf. *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 223, 226). Such a concerted refusal to deal with the discount houses, or group boycott, is illegal *per se.* See *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U.S. 600 (refusal by retailers to deal with wholesalers who sell directly to consumers); *Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791 (C.A. 2) (refusal by manufacturer and cooperating dealers to sell to another dealer at other than retail prices); *United States* v. *Waltham Watch Co.,* 47 F. Supp. 524 (S.D.N.Y.) (refusal by manufacturer and cooperating dealers to sell to unapproved outlets). Such a boycott cannot be justified by business needs or any other reason. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 214; *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207.

The fact that in *Parke, Davis* the aim of the combination was to "promote general compliance with [the manufacturer's] suggested resale prices" (362 U.S. at 45), while in the present case it was to stop

sales of Chevrolets through discount houses, is immaterial. For in both cases the ultimate aim of the combination—the suppression of competition by particular groups whom the conspirators disfavored—was illegal under the Sherman Act when achieved by concerted action. "The Sherman Act forbids combinations of traders to suppress competition" (*Parke, Davis,* 362 U.S. at 44). A combination between a manufacturer and its dealers certainly is no less illegal when the purpose is to prevent particular outlets from selling the product than when, as in *Parke, Davis,* the purpose is to require the outlets to stop price-cutting.

The combination in the present case, like that in *Parke, Davis,* was designed to eliminate, or at least to reduce, price competition. The record shows (see Statement, *supra,* p. 5) and the district court found (Fdg. 38, App. B, *infra,* p. 35a) that dealers and salesmen concerned about discount house selling complained about "cut rate" or "discount price" offers. While the court below found (erroneously, we believe) that General Motors was unconcerned about the retail price level (Fdgs. 37, 38, App. B, *infra,* pp. 34a–35a),[8] it was aware of the dealers' complaints about price-cutting; the campaign to eliminate discount house selling obviously was directed against one form of

[8] It is difficult to reconcile General Motors' apparent concern over the "profit opportunity" (Fdg. 17, App. B, *infra*, p. 24a) of its dealers with its alleged disinterest in the price level at which those dealers were compelled to compete as the result of discount house selling. Indeed, one General Motors official frankly recognized the "hazard" of allowing discounted prices to be freely quoted to a large portion of the public (G.X. 114).

price competition. The necessary effect of General Motors' acts was the suppression of such competition and, to that extent, the stabilization of prices.

In sum, the concerted refusal to deal with discount houses which this record shows was a typical example of a group boycott intended to drive from the market third parties whose merchandising threatened to undermine the price structure. As such, it was *per se* an unreasonable restraint of trade.

2. Contrary to the ruling of the district court, General Motors cannot justify the concerted refusal of its Chevrolet dealers to deal with discount houses, which it instigated, as a method of enforcing the prohibition in its dealer franchise agreements against the dealers establishing branch locations.

First, as we have noted (*supra,* p. 13), since the concerted refusal to deal constituted a group boycott, it is illegal *per se* regardless of any purported justification.

Second, General Motors' campaign to induce and persuade its dealers to stop discount house selling was not taken on its own initiative as a result of a unilateral decision that such selling was inimical to its own business interests. On the contrary, it was done at the insistence and because of the urging of certain of its dealers, who wanted to stop their competitors from engaging in such selling and who jointly had undertaken to persuade General Motors to use its power over the dealers to accomplish that end (see Statement *supra,* pp. 5–6). Furthermore, when General Motors undertook to get the individual dealers not to sell through discount houses, it explicitly in-

formed them that it was obtaining similar commitments from all their competitors—as, indeed, General Motors recognized was necessary (*supra,* pp. 6–7).[9] Thus, General Motors' enforcement of the prohibition against establishing branch locations so as to bar discount house selling involved a horizontal restraint in the form of a concerted refusal to deal. While in *White Motor Co.* v. *United States,* 372 U.S. 253, the Court left open the possibility of justifying a *vertically*-imposed territorial allocation, it had no doubt about the *per se* illegality of a horizontal agreement to divide markets. A horizontal group boycott is likewise *per se* illegal. 372 U.S. at 261, 263, and 267 (concurring opinion of Mr. Justice Brennan).

Finally, even if the prohibition on dealing with discount houses is viewed as having been imposed solely

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[9] As a practical matter, General Motors could not have stopped discount house selling unless all the dealers in the area undertook to do so. Were a single dealer to discontinue supplying discount houses served by others, he would in effect forfeit those sales to his competitors. See *Hale & Hale, Market Power: Size and Shape under the Sherman Act,* § 2.21 (1958). Thus, an individual dealer would be most unlikely to abandon such sales unless he were assured that his competitors would follow suit. On the other hand, a joint refusal to deal would prevent competitive disadvantage. As a matter of fact, General Motors obtained such an agreement by assuring each dealer that he would be placed at no such competitive disadvantage and each dealer's agreement was predicated upon the "substantial unanimity among [his] competitors" brought about by General Motors (*United States* v. *Parke, Davis & Co.,* 362 at 46–47). This was particularly necessary here since the Dealer Selling Agreement did not on its face ban discount house selling and General Motors had to resort to "policy" statements and "interpretive" discussions to inform each dealer that it did.

by General Motors without the participation of the dealers, it nevertheless constitutes an unreasonable restraint of trade and the dealer franchise agreements, to the extent that they bar such dealing, are themselves illegal.

In the *White Motor* case, *supra,* the district court had granted summary judgment in favor of the government, holding that certain restrictions imposed by a manufacturer of trucks upon the geographical area within which and the persons to whom its dealers could sell, were illegal *per se* under Section 1 of the Sherman Act. This Court reversed and remanded the case for trial, holding that "[w]e need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack * * * any redeeming virtue' * * * and therefore should be classified as *per se* violations of the Sherman Act" (372 U.S. at 263). It pointed out (*ibid.*) that vertical territorial limitations "may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business * * *." Mr. Justice Brennan in his concurring opinion noted that it also had been suggested "that it may reasonably appear necessary for a manufacturer to subdivide his sales territory in order to ensure that his product will be adequately advertised, promoted, and serviced" (372 U.S. at 269; footnote omitted).

The effect upon competition of permitting General Motors to enforce its franchise agreements so as to eliminate dealing with discount houses is clear: such price-cutting outlets are completely eliminated from the entire market for new Chevrolet automobiles.

In terms of the economic need for such restriction, General Motors obviously cannot justify the prohibition against selling through discount houses as "allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business" (*White Motor, supra*). The prohibition is not designed to protect General Motors against the aggressive competition of other automobile manufacturers, but to protect those General Motors dealers who do not wish to sell through discount houses at a lower profit margin against their competitors who do. General Motors is not a small company but the leading automobile manufacturer; Chevrolet is the largest selling automobile; and General Motors could hardly claim that its ability to operate profitably would be jeopardized if some Chevrolet dealers sold through discount houses.

The district court ruled, however, that the prohibition in the franchise agreement against establishing branch offices was valid because it "provides for each dealer an advantage of location convenience in his neighborhood and thereby gives him a 'head start' in a market of sufficient sales potential to provide him a fair profit opportunity" (Fdg. 17, App. B, *infra,* p. 24a); that selling through discount houses "has the same effect" as establishing a branch location (Fdg. 20, App. B, *infra,* p. 26a); and that con-

tinuation of discount selling "would, in time, cause the withdrawal from business of a substantial number of Chevrolet dealers" and result in "haphazard location" of dealers and representation of Chevrolet in important areas only by discount houses which would not provide service and would not be obligated aggressively to promote Chevrolet sales—all leading to the impairment of competition (Fdgs. 23, 24, App. B, *infra*, p. 27a). Assuming the validity of the findings as to the justification for General Motors' general prohibition against the establishment of branch locations, the record does not support the findings that continued discount house selling would impair the validity of Chevrolet's distribution system by causing a number of dealers to go out of business, and thus place General Motors at a competitive disadvantage vis-à-vis other automobile manufacturers.

There is no record support for the claim that dealers would be seriously injured—let alone forced out of business—by the diversion of sales to discount houses. Although some 2,000 Chevrolets were sold in 1960 through discount houses, no dealer in their area went out of business, and General Motors was unable to show that any dealer's "profit opportunity" was thereby impaired in any way that differed from the usual impact upon a merchant of vigorous competition by his rivals. Further, General Motors' executives were unable to say how many discount sales it would take to cause a dealer to threaten to terminate

his dealership because of lack of "profit potential."[10] There is no reason to believe that other Chevrolet dealers could not compete effectively either by themselves meeting the "discount" price or by selling through discount houses in other areas of the city.

The record similarly is devoid of evidence that the prohibition on discount selling, which admittedly eliminates some intrabrand competition between General Motors dealers, would increase interbrand competition between General Motors and other automobile manufacturers. See *White Motors*, 372 U.S. at 258-259, 263, 267-270 (concurring opinion of Mr. Justice Brennan). In the Los Angeles area, there are 85 Chevrolet dealers who engage in "intense interbrand competition" with each other,[11] each dealer having an average of five others dealing within a 5-mile radius (Fdg. 28, App. B, *infra*, p. 30a). There is nothing in the record which indicates that discount house selling did or would weaken General Motors' position against its smaller rival manufacturers. Indeed, since General Motors' rivals were (and as far as the record indicates still are) selling through discount houses, termination of distribution of General Motors auto-

[10] Similarly, while General Motors expressed concern over the impact of discount selling on the service available to the public (see Fdg. 12(b), App. B, *infra*, pp. 18a–19a), there is nothing to demonstrate that any vehicles in fact were not properly serviced because they were sold through discount houses, or that any dealer suffered serious financial loss as a result of providing such servicing.

[11] The franchise agreements in this case provided that the entire Los Angeles metropolitan region was the primary area in which all these dealers were "to develop properly the sale [of Chevrolets] at retail * * *" (G.X. 1, pp. 88, 95).

mobiles through such outlets would suppress rather than help inter-brand competition at those points.

In short, the district court's findings on the justification for the restraint are nothing more than speculative, unsupported conclusions. They merely show that insulating each General Motors dealer from the competition of discount house selling is consistent with a system designed to provide each dealer with some competitive advantage in his "own" territory over other General Motors dealers. That is, prohibition of discount house selling is said to be implicit in the franchise system, since the "maintenance of the system is based" on the "location [territorial] advantage of each dealership point" (Fdg. 25, App. B, *infra*, p. 29a). But this does not remotely suggest that a prohibition on discount house selling is necessary to promote competition between General Motors and other automobile manufacturers.

CONCLUSION

This appeal presents a substantial question of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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JANUARY 1965.

APPENDIX A

[Volume 9]

In the United States District Court, Southern District of California, Central Division

HONORABLE CHARLES H. CARR, JUDGE PRESIDING

No. 62-1208-CC Civil

UNITED STATES OF AMERICA, PLAINTIFF

v.

GENERAL MOTORS CORPORATION, ET AL., DEFENDANTS

Reporter's Transcript of Proceedings

Place: Los Angeles, California

Date: Monday, August 24, 1964

Pages: 1095 to 1114

[1099] *Los Angeles, California, Monday, August 24, 1964, 2:00 p.m.*

The CLERK. Case No. 6 on the calendar, 62-1208, United States of America v. General Motors Corporation, for further trial proceedings.

The COURT. Well, I am ready to render what purports to be a decision.

Is there anything further at this time before I do—other than the smog that we are having?

Anything for the Government further, this is your last chance.

Mr. BLECHER. Nothing further, your Honor.

The COURT. The last chance, Judge.

Mr. HANSEN. Nothing further.

Mr. MITCHELL. Nothing further, your Honor.

The COURT. I have made some notes, gentlemen, that I will refer to and give you my decision orally, more or less thinking it out as I go—spelling it out—giving you a general idea of the bases for my decision.

I have not had an opportunity or the time to try to write a decision by reason of a crowded calendar. So this, I suppose, might be considered a memorandum opinion, or a memorandum decision. And I doubt if it will ever be published, because I will not send it in for publication myself. But it will be in the record anyway.

[1100] I want to first say that as to both sides, all counsel, the preparation and presentation of this case has been excellent. And as you all know, somebody has to lose. And now I shall tell you who does.

The Government by this suit seeks to have the court decree that the defendants have engaged in a combination and conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. It then seeks to enjoin each of the defendants from carrying on the alleged combination and conspiracy and, in particular, it requests that General Motors be perpetually enjoined from imposing or attempting to impose any limitation or restriction upon any General Motors' dealers in dealing with discount houses.

It is also sought to enjoin General Motors from inducing, persuading or attempting to persuade any General Motors dealer to refrain from dealing with discount houses. The prayer of the complaint further seeks to enjoin General Motors from controlling or attempting to control prices at which any dealer may

sell automobiles and from attempting to exercise any restraint on the resale of automobiles by any dealer.

General Motors selects and contracts with various parties to carry on dealerships for Chevrolet automobiles. These contracts provide among other things for the [1101] non-exclusive privilege of selling Chevrolet automobiles, parts and accessories; and, although a dealer is assigned to a particular area, he may sell Chevrolet automobiles anywhere he finds a customer.

The contract provides that the selling agreement is a personal service contract and that the dealer shall actively, aggressively, and honestly promote the sale of Chevrolet automobiles, parts, and accessories; also that he shall conduct his business in a manner which will preserve the good will of Chevrolet.

It is further provided that the dealer "shall establish a place of business at a location mutually satisfactory to the dealer and General Motors and shall not establish a branch sales office without prior written approval of Chevrolet." The dealer is also required to maintain an approved business location not only for sales but for service operations and "parts and accessories sales."

As early as 1960 complaints were beginning to reach General Motors to the effect that discount houses were selling Chevrolet automobiles in the Los Angeles metropolitan area, the area involved in this suit. Letters and some telegrams were received from dealers and their salesmen complaining of referral sales by discount houses.

General Motors became seriously concerned with the [1102] matter of referral sales by discount houses in the latter part of 1960 and began to take steps looking toward the termination of the referral sales by discount houses.

Losor, a trade association whose membership consisted of Chevrolet dealers, about June 28, 1960, took notice of the discount house situation and began efforts to induce General Motors to take some action respecting the matter.

At a later time, about December 15, 1960, there was a meeting of the three dealer Associations, namely: Losor, Dealers' Service, Inc., and Foothill Dealers Association, which were all comprised of Chevrolet dealers in the metropolitan area. All of these organizations were interested in persuading General Motors to bring about a termination of referral sales by discount houses.

In the meantime and prior to the meeting of the three Associations, General Motors had undertaken through its representatives to advise the various Chevrolet dealers that it considered the discount referral transactions to be contrary to the Dealer Selling Agreements.

When the dealers were contacted and the matter discussed they indicated that they would discontinue the use of the discount houses for referral sales. In several instances where purchases of Chevrolet cars had been made by representatives of one of the dealer Associations the [1103] dealer refunded the purchase price and took back the Chevrolet automobile. The dealer organizations insist that their representatives made these purchases for the purpose of convincing General Motors that referral sales were being made by discount houses. The dealer Associations supplied the representatives of General Motors with the name of the dealer and the record of the sale which had been made.

The Government contends that because the dealer Associations endeavored to persuade General Motors that the discount house referral sales were detrimental

to the dealers and General Motors undertook to terminate the referral sales by the discount houses there came into existence a combination and conspiracy in restraint of trade. The Government contends that the activities amounted to a boycott and that, being a boycott, it is per se a violation.

The contention appears to rest upon the the premise that the effort to eliminate referral sales by discount houses was, in fact, directed at price control. In some instances some of the complaining salesmen, and in one or two instances a dealer, complained in telegrams and letters regarding the "cut-rate" or "discount price" at the discount houses. The evidence in the record, however, does not indicate that General Motors at any time was concerned regarding the price at which Chevrolet automobiles [1104] were sold since any dealer could sell at any price he desired and at any place.

It is the position of General Motors that its dealer contracts prohibit the establishment of an additional dealership or branch, and that to permit the establishment of such would be extremely detrimental not only to their method of distribution through dealerships but that their entire program of distribution would be completely destroyed.

In this it is contended that an important part of the system encompasses the product loyalty of the dealership, the facilities for parts and services, the capacity to comply with warranties and many other services that are afforded by Chevrolet dealerships but are not available at discount houses. It is also important to note that discount houses sell more than one make of automobile and necessarily are interested in the sale rather than promoting one particular make.

The Government appeared to concede during the trial, although apparently now contending otherwise, that General Motors by reason of its contractual rights

could have prevented the activity of the discount houses in the beginning but that, having endeavored to induce the Chevrolet dealers to take action, a combination and conspiracy involved by reason of the at least tacit agreement of the Chevrolet dealers to refrain from doing business with [1105] discount houses.

General Motors, on the other hand, contends that it has the legal right to require a dealer to operate from his established dealership and not to use discount houses; that General Motors in endeavoring to persuade dealers to comply with this contract was acting unilaterally and without any agreement or understanding with the dealers; and that merely because General Motors and the dealer Associations may have had the same objective in mind it does not follow that a combination and conspiracy came into being.

To hold that parallel action or the same objective pursued by different parties necessarily establishes a combination and conspiracy, would preclude many ordinary business activities. Here it must be assumed that General Motors distributor contracts are legal and in and of themselves in no way in violation of the Sherman Act.

As heretofore pointed out, the Chevrolet dealers are free to sell at any price, to anyone, at any time. They are, however, required to maintain an established place of business which meets certain requirements of the dealership contract. Chevrolet dealers are required to make periodic reports to General Motors and to carry on business in accordance with established standards which are applicable to Chevrolet dealers generally.

[1106] Maintenance of sales facilities, service facilities, inventory of parts, and many other matters directly affecting the distribution of Chevrolet automobiles are prescribed by the dealership contract. It

is contended that the dealership relationship with customers is one of the important phases of the system and that without it the business of General Motors would suffer materially.

In this connection it is pointed out that where a referral sale is made through a discount house, although the warranty provisions relating to the car require any dealer to provide service pursuant to those warranties, the dealers generally would show little or no interest in satisfying the warranty conditions.

It is emphasized that the location of dealers is of great importance since persons requiring service usually desire to go to a dealership as near as possible to their home or business and if the dealers were not strategically located the purchasing public would be greatly inconvenienced in obtaining service at Chevrolet dealers as well as genuine Chevrolet parts.

The evidence indicates that General Motors relies heavily upon the information received from its dealers in scheduling production programs. The information received from its dealers helps make it possible to plan its production which is done far in advance of the release [1107] of the new models each year.

From the facts of this case, it appears that General Motors is seeking to enforce a contractual obligation with its Chevrolet franchise dealers. While those agreements make many requirements of the dealers they do not limit competition among the dealers. All dealers are free to sell at any price, even at a loss, if they desire, and they may compete with other dealers in that dealer's area.

The evidence clearly discloses that Chevrolet dealers are in vigorous competition with each other in discounting the prices in the sale of Chevrolets. To insist that a manufacturer and distributor of auto-

mobiles is not permitted to select and set up standards for the operation of his dealers upon the theory that it was an unreasonable restraint of competition would result not only in the destruction of the competition which benefits the public but would probably eliminate the distributor system entirely.

Without such a system it would no doubt be impossible for a large manufacturer to plan its program for new cars each year which entails preparation and planning far beyond the concept of a person not familiar with the business.

[1108] If Chicago Board of Trade v. United States, 246 US 231 means what it says, the test enunciated therein certainly applies in this case. Considering all of the factors encompassed in the relationship between General Motors and its franchise dealers and the public, it must be concluded that the dealer contracts promote rather than suppress competition, and benefit the purchasing public.

It is difficult to conclude that the exclusion of discount houses, which supply no facilities for repairs or the supply of genuine Chevrolet parts, or who fulfill warranty obligations or who do anything, in fact, except offer for sale a Chevrolet automobile—or a competing automobile if the customer indicates a preference—would constitute an unreasonable restraint of competition violative of the Sherman Act.

There is not too much conflict in the evidence respecting the alleged conspiracy. As heretofore noted, certain Chevrolet dealers and, in particular, Losor, began to call upon General Motors to bring about an end to the discount house operation. Thereafter General Motors took more serious note of the situation and considered what could be done.

Finally General Motors took action and made it known through its representatives to Chevrolet deal-

ers that the use of discount houses was, in its opinion, a [1109] violation of the Chevrolet franchise contracts. It was not until December 15, 1960, that the three Chevrolet organizations, Losor, D.S.I. and Foothill, began to meet together for the purpose of encouraging General Motors to bring about a cessation of the discount house situation. After General Motors had made known its position, the Chevrolet dealers continued to make purchases from discount houses through shoppers and bring those transactions to the attention of officials of General Motors. When this was done the dealer would usually refund the money and take back the car which had been sold.

It is undoubtedly true that to some extent the general objective of General Motors and its dealers coincided, but General Motors was interested in maintaining and continuing its distributor system through franchised dealers and in the main the dealers were interested in preventing the referral sales of Chevrolets by discount houses, particularly since they were required to carry out all of the contract obligations to the purchasers of Chevrolet automobiles, and in many instances maintain service departments at a financial loss, which was not done by the discount houses.

It may well have been that some of the individual dealers were complaining about the discount prices of the discount houses, but the evidence in the case does not [1110] support the conclusion that General Motors was endeavoring to maintain a price structure. [1111] Since General Motors was legally entitled to enforce its contracts, the mere urging of some of its dealers for assistance would not seem to change an independent action by General Motors into a combination or conspiracy.

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Conspiracy has become a catch-all dragnet concept which becomes more and more expansive year by year. This tendency was commented upon in the case of Krulewitch v. United States, 336 U.S. 440, and, in particular, by Mr. Justice Jackson in a concurring opinion. To hold that a conspiracy arises, where a person is urged by other persons to exercise his legal rights, and he does so, would preclude communication between business organizations. In this connection the Government relies upon United States v. Parke-Davis & Company, 362 U.S. 29, but that case is wholly different from the case at bar.

The mere fact that General Motors brought about a result that was desired by some of the Chevrolet dealers is not sufficient to raise an inference of conspiracy. The circumstances in this case must be viewed in an environment of practicality and when that is done it is impossible for this court to conclude that a conspiracy existed. There was no reason to conspire to do what legally could be done.

Assuming that the court is correct in holding that General Motors has the legal power to enforce its dealership [1112] contracts and to preclude the use of discount houses by its dealers, it would be a useless act for the court to restrain General Motors or the Dealer Associations from conspiring, if there were in fact a conspiracy, when the court is actually deciding that General Motors has a legal right to do what it did and that the Dealer Associations had a right to urge General Motors to do what it did. A court of equity does not do a useless act.

The court concludes that the Government has failed to produce proof to establish the allegations of its complaint and for the relief prayed for in its prayer. Judgment will be entered accordingly for the defendants.

Counsel for the defendants are directed to prepare proposed findings of fact and conclusions of law and decree pursuant to Local Rule 7.

In that connection I suggest, gentlemen, that you combine the findings into one, not two separate findings.

And I think that I might just comment and say that I have been over the findings of both the Government and the defendant dealer organizations and the defendant General Motors. And I think that on the whole that there should not be too great a difficulty—but I have no objection to including, Mr. Mitchell, all of the findings that you have, at least what might say the historical preliminary based on the facts leading up to the ulimate findings of fact that I [1113] think from what I have read you could call the gist of my decisions. And I am convinced that you will have no trouble. But they should be reformed and put together and combined.

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[1114] * * * * *

APPENDIX B

United States District Court, Southern District of California, Central Division

Civil No. 62-1208-CC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on June 16, 1964, before the Honorable Charles H. Carr, Judge of the above entitled Court. Plaintiff was represented by Maxwell M. Blecher of San Francisco and Robert C. Weinbaum of Washington, D.C. Defendant General Motors Corporation was represented by O'Melveny & Myers, Homer I. Mitchell, Henry C. Thumann and Donald M. Wessling of Los Angeles; Lawler, Felix & Hall, Marcus Mattson, J. Phillip Nevins and John M. Maller of Los Angeles; and Aloysius F. Power, Robert A. Nitschke and Nicholas J. Rosiello of Detroit, Michigan. Defendants Losor Chevrolet Dealers Association; Dealers' Service, Inc.; and Foothill Chevrolet Dealers Association were represented by Hansen & Dolle and Victor R. Hansen of Los Angeles and Glenn S. Roberts of Los Angeles. Evidence, both oral and documentary, was received by the Court and the case was argued and submitted for decision.

Now, Therefore, the Court, being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Stipulations of Facts Number One (Plaintiff's Exhibit 1), Number Two (GM Exhibit No. AA), and Number Three (GM Exhibit No. AZ) are limited to the period from June 1, 1960 through October 12, 1961 and all facts found herein, whether stated in the past or present tense, relate to said period unless otherwise stated.

2. As used herein, the following terms have the meanings indicated:

(a) "Chevrolet automobiles" means all of the various series and models of new passenger cars, station wagons, and trucks sold by the Chevrolet Motor Division of General Motors Corporation under trade names including "Chevrolet," "Corvair," and "Corvette," but excluding "Chevy II" and "Chevelle."

(b) "Chevrolet dealer" means any of the persons, firms or corporations who were parties to a Dealer Selling Agreement with the Chevrolet Motor Division of General Motors Corporation.

(c) "Dealer Selling Agreement" means the written agreement (including all amendments, addenda and supplements thereto) entered into between each Chevrolet dealer and the Chevrolet Motor Division of General Motors Corporation under which such dealer purchases for resale Chevrolet automobiles and Chevrolet parts and accessories therefor from said Chevrolet Motor Division and which recites the rights, privileges, obligations and liabilities of the parties thereto in connection therewith.

(d) "Chevrolet" means the Chevrolet Motor Division of General Motors Corporation which has its

principal offices in Detroit, Michigan, and which is the sole producer of Chevrolet automobiles.

(e) "Southern California area" means the Counties of Los Angeles, Orange, Riverside, San Bernardino, Ventura, San Diego, Imperial, San Luis Obispo and Santa Barbara, State of California.

(f) "Los Angeles Metropolitan Area" means the following described area in the State of California:

In Los Angeles, San Bernardino and Orange Counties, that area bounded by the western and northern city limits of Los Angeles from the Pacific Ocean north and east to the northern city limits of Glendale and the Angeles National Forest Boundary. Continuing east along the Angeles and San Bernardino National Forest Boundaries including the northern city limits of Pasadena, Monrovia, Bradbury, Duarte and Azusa to the Cucamonga Creek; thence south along the Cucamonga Creek to 19th Street at the city limits of Upland, East on 19th Street to Haven Avenue; south on Haven Avenue to the Southern Pacific Railroad tracks, thence west on the railroad tracks to Archibald Avenue, south on Archibald Avenue including the city limits of Ontario to the San Bernardino County line. Thence southwest on the San Bernardino County line to the Orange County line and then southeast on the Orange County line to Santa Ana Canyon Road (Riverside Freeway); southwest on Santa Ana Canyon Road to the city limits of Anaheim. Around the city limits of Anaheim and the city limits of Orange to Santiago Blvd. Thence south and east on Santiago Blvd. to Chapman Ave., east on Chapman Ave. to Newport Ave., south on Newport Ave. to Newport Blvd. Continued southwest on Newport Blvd. including the city limits of Tustin to MacArthur Blvd., south on MacArthur Blvd. to the city limits of Newport Beach; thence southeast along the city limits of Newport Beach to the Pacific Ocean; including

non-post office areas located within or without the area described above served by post office stations located within the area described above.

In addition, the following communities in Los Angeles County: Agoura, Mt. Wilson, Calabasas, Olive View, Malibu.

Including non-post office areas served by post office stations located in the above named communities.

In San Bernardino County, the community of Mt. Baldy; including non-post office areas served by post office stations located in the community of Mt. Baldy.

In addition, the following communities in Orange County: El Toro, Silverado, Irvine, Trabuco Canyon.

Including non-post office areas served by post office stations located in the above named communities.

3. General Motors Corporation (hereinafter "General Motors") is a corporation organized and existing under the laws of the State of Delaware with principal offices both in New York, New York, and Detroit, Michigan.

4. Losor Chevrolet Dealers Association (hereinafter "Losor") is a non-profit corporation, organized and existing under and by virtue of the laws of the State of California. Membership in Losor consisted of Chevrolet dealers in Orange County or Los Angeles County, State of California.

5. Dealers' Service, Inc. (hereinafter "DSI") is a non-profit corporation, organized and existing under and by virtue of the laws of the State of California. Membership in DSI consisted of Chevrolet dealers in the County of Los Angeles, State of California.

6. Foothill Chevrolet Dealers Association (hereinafter "Foothill") is a non-profit corporation, organized and existing under and by virtue of the laws of

the State of California. Membership in Foothill consisted of Chevrolet dealers in the Counties of Los Angeles, Riverside, or San Bernardino, State of California.

7. Losor, DSI and Foothill are independent of General Motors and are not operated, directed, controlled or guided by General Motors. Each was formed many years ago by franchised Chevrolet dealers without any solicitation or encouragement by General Motors. None of these associations engages in the sale of automobiles. Each provides services for its dealer members among which are the maintaining of an information bureau to assist dealers in making exchanges with other dealers to obtain particular Chevrolet cars of the models, colors and equipment required to fill orders from particular customers; the providing of advertising campaigns and sales promotion activities; and the engaging in advocating the passage of legislation pertaining to motor vehicles.

8. Component parts of Chevrolet automobiles are produced by or for Chevrolet in plants located in various states of the United States, including California. These parts are shipped to various assembly plants operated at various locations in the United States, including Van Nuys and Oakland, California. While most of the Chevrolet automobiles shipped to Chevrolet dealers in the Southern California area are assembled at said Van Nuys and Oakland, California, assembly plants, some Chevrolet automobiles are shipped to such dealers from assembly plants located outside of California. Substantially all shipments of Chevrolet automobiles are made pursuant to orders placed by such dealers (a) after they have received and accepted orders from consumers or (b) in anticipation of orders to be received and sales to be made.

9. Chevrolet relies on Chevrolet dealers to provide the retail selling organization for Chevrolet automobiles. They are independent merchants who buy Chevrolet automobiles from Chevrolet for resale. These dealers are franchised to operate according to and as a part of a system for merchandising Chevrolet automobiles developed over a period of 40 years by General Motors. This franchise system is embodied in written Dealer Selling Agreements. General Motors enters into a separate agreement with each Chevrolet dealer. All of the approximately 15,000 General Motors dealers for all makes of General Motors automobiles operate under substantially identical franchise systems and enter into substantially identical Dealer Selling Agreements.

10. Under the Chevrolet Dealer Selling Agreements, a dealer may sell Chevrolets at any price and to any person anywhere he finds a customer; there is no restraint on the retail prices at which the dealer may sell or the customers to whom he may sell. Although the dealer must operate out of a place of business at a location mutually satisfactory to him and to Chevrolet, he has neither territorial exclusivity nor territorial security. Under the Chevrolet franchise system, Chevrolet dealers are expected to compete with each other as well as with dealers in all rival makes of cars as to price and as to all other factors which may influence the public in choosing what make or model of car, where and from whom to buy. The Chevrolet Dealer Selling Agreements do not limit competition among Chevrolet dealers or between Chevrolet dealers and dealers in rival makes of automobiles.

11. The Dealer Selling Agreements restrict the Chevrolet dealer from transferring his sales obligations to others and from establishing branch sales offices at locations other than his place of business

approved by Chevrolet. These restrictions do not preclude the Chevrolet dealer from soliciting customers anywhere but they do preclude such dealer from using unapproved business locations out of which to solicit the sale of Chevrolet automobiles. These restrictions were included by Chevrolet in its franchise system in response to requirements arising out of the nature and needs of the product and of the retail market and are basic to the Chevrolet franchise system.

12. The major product and market requirements which led Chevrolet to develop and adopt its franchised dealer system are as follows:

(a) The automobile is a complex, mobile product in daily family use. It cannot satisfy its owners unless adequate service and parts facilities are conveniently available. Chevrolet therefore needs to assure itself that competent service and a supply of parts are conveniently available to consumers. Satisfied customers are both the source of favorable word-of-mouth advertising and are repeat customers. The average person purchases a new car every three and one-half years and seventy per cent of Chevrolet's business comes from repeat customers.

(b) As the manufacturer of a product, Chevrolet has obligations to consumers which usually must be met in the field. Latent defects may occasionally show up in certain models only after a number of units have been sold. The owners of these models must be traced and found and their cars repaired with dispatch. Also, mass produced cars may need minor work when they reach the dealers or their customers. Chevrolet needs dealers upon whom it can rely and who will have an incentive to find and remedy these minor defects which can be so annoying to the new car owner. Moreover, Chevrolet issues a written warranty on each new automobile. This

warranty is an effective competitive sales tool only if its obligations are promptly and properly discharged at the consumer level. For each of these, Chevrolet needs a retail organization with conveniently located and competently equipped and staffed facilities which will be on the job year in and year out and whose loyalty to and interest in the continuing good will and success of Chevrolet provide an incentive to meet these obligations to the satisfaction of consumers.

(c) The nature of the automobile market is such that the volume of sales will tend to be high at some times in the year and low at others. Thus, annual model changes produce peaks and valleys. So also does severe winter weather in much of the country. An aggressive retail selling organization willing and able to create demand during the slack seasons is needed to help iron out these fluctuations.

(d) Chevrolet may face lean years by reason of business cycles in the national economy or by reason of a miscalculation in size, styling or mechanical design in annual model changes or by reason of other adverse circumstances. Chevrolet needs a retail organization which will survive such lean years so that service and parts will continue to be provided to the owners of previous as well as current models and so that there will be a retail organization in being for a comeback.

(e) The logistics for the manufacture of an automobile are complicated. They involve committing for numerous, expensive and bulky supplies, machinery and equipment long before the start of production. They require constant forward planning under varying lead times for all steps beginning from the time a car is designed years before the start of production; continuing through all the numerous and complicated intermediate steps; and including the

actual production of the finished automobile on the final assembly line. Frequent periodic readings of the nationwide market detailing current and expected sales performance are essential in matching production schedules to consumer demand. An experienced nationwide network of retail dealers who are in close contact with consumers, whose salesmen have prospect files and customer lists, and who are capable of obtaining and reporting the necessary data is essential to rational production scheduling at the factory.

13. Chevrolet has designed its franchise system to cope with these requirements of the product and the market in order to meet the competition of its rival manufacturers and to obtain for Chevrolet continuing consumer satisfaction and thereby success in the market place. By its franchise system, Chevrolet endeavors to establish a retail organization composed of dealers who can continue to maintain an aggressive sales effort in good times and in slack times, can promote the good will of Chevrolet owners by convenient, adequate and courteous service and can perform essential functions in production scheduling.

14. The Chevrolet Dealer Selling Agreements which embody Chevrolet's franchise system grant to the dealer the non-exclusive privilege of selling new Chevrolet automobiles, parts and accessories sold to the dealer by the Chevrolet Motor Division and, in connection therewith, of displaying the various Chevrolet trademarks. In return for this privilege, the dealer agrees, among other things:

(a) That the Dealer Selling Agreement is a personal service contract entered into by Chevrolet with the dealer in reliance upon and in consideration of the personal qualifications of the dealer and the persons named as those who will actively participate in the ownership or operation of the dealership.

(b) That the dealer shall actively, aggressively and honestly promote the sale of Chevrolet automobiles, parts and accessories.

(c) That the dealer shall conduct his business in a manner which will preserve the good will of Chevrolet.

(d) That the dealer shall not transfer his sales obligation to others without the written consent of Chevrolet.

(e) That the dealer shall establish a place of business at a location mutually satisfactory to the dealer and Chevrolet and shall not establish a branch sales office without prior written approval of Chevrolet.

(f) That the dealer shall maintain at his approved business location facilities adequate in size and layout for sales and service operations and for parts and accessories sales.

(g) That to enable Chevrolet to establish production schedules and to place orders with its suppliers on the basis of the lead time normally required in the automobile mass production industry, the dealer shall furnish Chevrolet ten-day sales and inventory reports and each month shall furnish an estimate of his requirements of new Chevrolets for each of the three succeeding months.

(h) A Metropolitan Area Addendum is made a part of the Dealer Selling Agreement of each dealer located in a metropolitan area of over 50,000 population in which two or more Chevrolet dealers have common sales and service responsibilities. It recites that Chevrolet has determined the maximum number and geographical locations of dealer points to be located in the area. Chevrolet agrees that if dealer points are to be increased in number or changed in location, it will give each dealer in the metropolitan area sixty days' written notice and an opportunity to be heard.

15. In administering its franchise system, Chevrolet is confronted with the following problems peculiar to competition in the automobile industry:

(a) To compete successfully over the long term, Chevrolet dealers' sales, service and parts facilities must be located conveniently to consumers. The location of dealers is of great importance since persons requiring service usually desire to go to a dealership as near as possible to their home or business and if dealers are not strategically located, the purchasing public will be greatly inconvenienced in obtaining service at Chevrolet dealers as well as genuine Chevrolet parts.

(b) The performance of the obligations imposed by a Chevrolet Dealer Selling Agreement requires a substantial capital investment. In the Los Angeles Metropolitan Area the capital investment in Chevrolet dealerships ranges from a minimum of approximately $70,000 to a maximum of approximately $1,500,000.

(c) The proper performance of the service and parts obligations imposed by the Chevrolet Dealer Selling Agreement contributes importantly to customer good will and the overall profitability of a dealership. However, analyzed on a departmental basis and allocating to the service and parts departments their share of the dealership administrative expenses, those departments of the Los Angeles Metropolitan Area dealers generally operated at a loss. As shown by an independent study made on this basis by Price Waterhouse & Co., the typical Chevrolet dealership in the Los Angeles Metropolitan Area incurred an annual loss in the 1960 operation of its service and parts departments of approximately $14,000.

(d) Reasonably prudent businessmen will not undertake such required capital investment nor will they undertake the performance of the service and parts

functions unless the overall operation of the dealership affords a reasonable profit opportunity.

(e) The existence of such a reasonable profit opportunity depends upon the availability to each dealership of a sales potential which, if achieved, would be sufficient (i) to enable the dealer to perform his service and parts obligations; (ii) allow him to meet the overhead expense of his entire operation; (iii) provide him with a fair compensation for his services rendered; and (iv) provide him with a reasonable return on his total investment in the dealership.

16. Chevrolet endeavors to appoint the right number of dealers located in the right places to satisfy the requirements of the product and the market described in Paragraph 12 of these Findings of Fact and to deal with the problems described in Paragraph 15 of these Findings of Fact. This is done on the basis of comprehensive studies which General Motors has developed over a period of 40 years and in which, briefly stated, Chevrolet does the following:

(a) Detailed field surveys are made of the area by trained survey teams which use extensive population, geographic and market research data as well as detailed analyses of motor vehicle registration data for the area to determine the number and locations of dealers which will provide convenience of sales, service and parts facilities to the public.

(b) The motor vehicle registration data for a representative period of years furnishes a basis for predicting the sales and service potential of each community and neighborhood in the area based on a count of sales made in those years of Chevrolets and competitive makes of automobiles and on a census of the Chevrolet automobile population in the area.

(c) Based on information and experience previously gained in the area over a representative period of

years and on a detailed study of the facilities and investments required to satisfy the sales and service needs of the area, Chevrolet then appoints what its studies indicate will be the right number of dealers at the right locations to provide aggressive and competitive sales effort; to provide each dealer a fair profit opportunity; and to provide consumers with convenient sales, service and parts facilities.

17. The location restriction of the Dealer Selling Agreements prevents dealers from nullifying Chevrolet's planned location of the right number of dealers in the right places. This restriction provides for each dealer an advantage of location convenience in his neighborhood and thereby gives him a "head start" in a market of sufficient sales potential to provide him a fair profit opportunity. A Chevrolet dealer's location advantage does not protect him from the competition of other Chevrolet dealers who may sell at any price, to anyone, anywhere. As demonstrated by General Motors' experience over the last 30 years, if there were no location restriction and if other dealers were free to establish sales outlets in the neighborhood of an established dealer, the sales potential of an area adequate only for one outlet (as indicated by General Motors' market surveys) would be divided among several outlets and even though the one dealer were fully competitive as to sales, service, parts and price, it would no longer be profitable for him to remain in business. Under these circumstances, it would be difficult to persuade another dealer-investor to replace him. Thus Chevrolet would lose the competitive advantage of having a sales, service and parts facility in a neighborhood where one was needed to satisfy the product and market requirements described above in Paragraph 12.

18. In the early summer of 1960, some Chevrolet dealers in the Southern California area were selling

new Chevrolets pursuant to agreements or understandings with some discount houses and referral services. Pursuant to these agreements or understandings, the discount houses and referral services performed many of the merchandising functions normally performed by Chevrolet dealers. These functions included one or more of the following: Providing an established business location which served as a point of contact with potential Chevrolet customers; referring potential customers to dealers who had agreed in advance to quote such customers prices based on specified mark-ups over the dealers' invoice costs; taking orders for new Chevrolets; negotiating with potential customers on the prices, terms and conditions of sale for new Chevrolet automobiles; negotiating price allowances for trade-ins; and delivering new Chevrolet automobiles to purchasers. In every case, the sale of the new Chevrolet automobile to the customer was made by the Chevrolet dealer through the discount house or referral service with title passing directly from the dealer to the customer. In no case did the dealer sell to the discount house or referral service and in no case did the discount house or referral service make a resale.

19. Each such discount house or referral service operated from a business location removed from the authorized location of the Chevrolet dealer in the sale of whose cars the discount house or referral service performed merchandising functions. Most were actually merchandising locations for wares of many sorts and advertised themselves as outlets or locations where people could go to buy Chevrolets. Such stores, or their concessionaires, operated new car sales departments which distributed Chevrolet promotional literature to prospective customers in the same manner as Chevrolet dealers. Some used Chevrolet's trademarked in-

signia. Some displayed new automobiles, including Chevrolets. These stores in fact were outlets or locations for the merchandising of new Chevrolets in addition to the outlets whose number and location had been determined by Chevrolet as necessary for the proper operation of its franchise system.

20. The practice of selling Chevrolet automobiles through discount house or referral service outlets engaged in by some Chevrolet dealers has the same effect as the direct establishment by these dealers of branch sales offices without the approval of Chevrolet. Another outlet in the same area is another point of contact with local customers that would attract and be able to sell a certain per cent of the potential customers in the area even though the existing outlets in the area were fully competitive as to prices. As the number of outlets in an area increases, the opportunity to obtain the area's business decreases for each of the outlets operating in the area.

21. Seventy per cent of all the Chevrolet dealers in the Los Angeles Metropolitan Area had from one to five discount house or referral service outlets located within five miles of their dealerships performing merchandising functions for Chevrolet dealers who in most instances were located far away from such outlets.

22. As shown by an independent study made by Price Waterhouse & Co., a small reduction in the volume of new car sales will result in a disproportionately large reduction in overall operating profit because a substantial proportion of the total expense of a Chevrolet dealership is relatively fixed. For example, an approximate reduction of 12% in new passenger car sales volume would result in the elimination of all operating profits for the typical Los Angeles Metropolitan Area Chevrolet dealerships hav-

ing an annual sales volume of 250 to 350 new vehicles. Furthermore, an approximate reduction of 33% in new car sales volume would have the same or worse results for all of the typical classes of Los Angeles Metropolitan Area Chevrolet dealerships having an annual sales volume of less than 750 new vehicles. Approximately 40% of the Chevrolet dealerships in the Los Angeles Metropolitan Area had an annual sales volume of less than 750 new vehicles. In the Los Angeles Zone, 61% of the Chevrolet dealers had an annual sales volume of less than 750 new vehicles.

23. Prudent dealers failing to make a fair profit would cease doing business long before their operating profits were eliminated. The failure to restrict the use of discount houses or referral services as outlets for new Chevrolet cars would, in time, cause the withdrawal from business of a substantial number of Chevrolet dealers. This would result in the haphazard location of the remaining dealerships, would leave large and important market areas in which Chevrolet's only representation would be by discount houses or referral services and competition would be impaired.

24. The discount houses and referral services do not provide Chevrolet with the kind of retail selling organization needed to cope with the requirements of the product and market described in Paragraph 12 of these Findings of Fact.

(a) They have no service or parts facilities and therefore cannot provide convenient service to Chevrolet owners residing or traveling in their area. Neither can dealers using discount houses or referral services as sales outlets provide convenient service because they are usually located at a distance from such outlets. The discount houses or referral services and the distant selling dealers who use these outlets in fact

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relied on the existence of convenient service facilities provided by nearby Chevrolet dealers. Their own ability to sell Chevrolets by this means in these areas would be seriously curtailed by the disappearance of the convenient facilities of these dealers because the resulting gaps in service facilities inevitably would injure customer good will toward Chevrolet.

(b) Discount houses and referral services do not promote Chevrolet sales, but instead take orders for any make of cars. They do not promote sales of Chevrolet automobiles during slack periods of the year or during lean years. Chevrolet therefore cannot depend upon discount houses or referral services to provide the active and aggressive sales effort needed year in and year out.

(c) Having no legal relationship with Chevrolet, discount houses or referral services cannot be relied upon to provide the factory with the accurate and first-hand market information needed for orderly production scheduling. Dealers using discount houses or referral services as sales outlets would not be close enough to the market to provide the needed information.

(d) Having no particular stake in Chevrolet's continuing good will or the facilities or personnel to perform the services necessary to preserve that good will, discount houses or referral services cannot be relied upon to perform the tasks required in correcting latent defects, remedying minor mechanical problems and carrying out warranty obligations. The dealer using the discount houses or referral services as sales outlets is too far removed from the customer to perform or be sufficiently concerned about the proper performance of these important tasks.

Competition with other makes of cars would thereby be impaired.

25. The use by Chevrolet dealers of discount houses or referral services as sales outlets for new Chevrolets defeats an important objective of the Chevrolet franchise system and is in derogation of the system. Such arrangements have a greater inimical effect on such system than the establishment of dealer-controlled branch sales offices. They can be established and quickly multiplied with no investment in facilities and with no overhead burden. The quality of their personnel is accidental. They are a way of accomplishing that which is directly prohibited by Paragraph 6 of the Dealer Selling Agreement. Said Paragraph 6 reads, in part, as follows:

> "* * * Once Dealer is established in facilities and at a location mutually satisfactory to Dealer and Chevrolet, Dealer will not move to or establish a new or different location, branch sales office, branch service station, or place of business, including any used car and/or truck lot or location without the prior written approval of Chevrolet."

The purpose of Paragraph 6 is to prevent dealers from impairing the location advantage of each dealership point upon which maintenance of the system is based by restricting Chevrolet dealers from selling new Chevrolet cars from merchandising locations other than those established in accordance with the Chevrolet franchise system.

26. The use by Chevrolet dealers of these outlets also defeats the purpose of the provisions of the Dealer Selling Agreement which prohibit each dealer from transferring or assigning to third parties his sales and service obligations and which provide that the Dealer Selling Agreement is a personal service contract entered into by Chevrolet in reliance upon the personal qualifications of the dealer. The purpose

of these provisions is to prevent Chevrolet's good will from falling into the hands of persons unqualified to carry out the requirements of the franchise system and having no incentive to represent Chevrolet aggressively and loyally.

27. The practice by a Chevrolet dealer of using discount houses or referral services as sales outlets for his sales of Chevrolet automobiles is in derogation of the purposes of the Chevrolet franchise system and violates the Chevrolet Dealer Selling Agreement.

28. There was an average of five other Chevrolet dealers located within five miles of each of the 85 Chevrolet dealer locations in the Los Angeles Metropolitan Area. There is intense intrabrand competition among Chevrolet dealerships. This competition takes various forms, including advertising, sales technique, service performance and selling price. Different dealers emphasize different forms of such overall competition.

29. All Chevrolet dealers in the Los Angeles Metropolitan Area engage in intense competition with dealers in other makes of cars in the Chevrolet price class. There was an average of 22 dealers selling competing makes of new cars (exclusive of competing General Motors makes) who were located within five miles of each of the 85 Chevrolet dealers in the Los Angeles Metropolitan Area. There is intense interbrand competition among all dealerships for all makes of automobiles in the Chevrolet price class.

30. Restricting dealers from selling through discount houses or referral services does not limit price competition. All dealers are free to sell at any price to any customer anywhere and the number and locations of Chevrolet dealers in the Los Angeles Metropolitan Area offer convenient opportunity and adequate choice to potential customers for Chevrolet

automobiles to shop the dealers in the area for the most competitive deal. The number and proximity to each Chevrolet dealer of other Chevrolet dealers as well as dealers in rival makes gives the price-conscious purchaser the freedom and ability to pit the price of one dealer against the prices of the others and to give his patronage to the dealer who offers him the best price.

31. Chevrolet dealers were in vigorous competition with each other in discounting prices in the sale of Chevrolets. As shown by an independent study made by Price Waterhouse & Co. there was no appreciable difference between the prices paid by customers who purchased Chevrolet passenger cars from a dealer through a discount house or referral service and the prices paid by ordinary retail customers who purchased directly from that dealer. The evidence in this case does not support the conclusion that General Motors was endeavoring to maintain a price structure in the sale of Chevrolet automobiles.

32. On the other hand, some of the arrangements whereby new cars were sold through discount houses or referral services interfered with price competition between Chevrolet dealers who were parties to such arrangements and between Chevrolet dealers and those dealers in competing makes who were parties to such arrangements. Several referral services which had such arrangements with several Chevrolet dealers as well as with dealers in other makes of cars made it a practice to emphasize that new cars were available at their locations on a non-negotiable, one-price basis. One of the referral services advertised that it had "controlled prices" at which customers could purchase new Chevrolets and other new cars. It instructed Chevrolet salesmen who handled the referred customers at the Chevrolet dealerships to refuse to

negotiate on price and to quote one price on a "take it or leave it" basis. Another referral service required each dealer to sign a standard form of letter agreement under which the dealer agreed to sell his cars to referred customers at a specified price which was stated as a specified amount above the dealer's invoice cost. The price quoted in said standard form of letter agreements, signed by competing Chevrolet dealers who were using said referral service, was identical and remained fixed over the full model year. Said referral service required the dealers to furnish invoices of sales made to referred customers and regularly checked these to see that the agreed price was maintained by the dealers in respect of all customers referred by said referral service. A substantial number of the sales made by Chevrolet dealers during 1960 through discount houses and referral services were made pursuant to said non-negotiable, one-price, non-competitve arrangements with said referral houses.

33. The Chevrolet franchise system with its location restrictions and its restrictions against transferring or assigning to third parties sales and service obligations promotes rather than impairs competition in the retail sale of Chevrolet automobiles and benefits the purchasing public. It enhances Chevrolet's ability to compete with other manufacturers, promotes the competition of Chevrolet dealers with dealers selling rival makes and promotes the competition of Chevrolet dealers with each other.

34. Beginning in the summer of 1960, defendant Losor, through some of its dealer-members complained to personnel at the Chevrolet Los Angeles Zone Office about the sale of Chevrolets by some dealers through discount houses or referral services and sought to induce General Motors to take some action respecting

such selling. The Zone Office personnel at that time informed the complaining dealers and some of the dealers selling through discount houses or referral services that although said personnel considered the practice inimical to the Chevrolet franchise system, they had no authorization from their superiors in Detroit to take any action to stop such selling.

35. At a meeting of Losor on November 10, 1960, the Chevrolet dealers there present agreed to write letters or send telegrams and attempt to have their salesmen write letters or send telegrams to General Motors asking that something be done regarding the (discount house) situation. Some such letters and telegrams were sent by members of Losor and their salesmen by reason of such encouragement by Losor, and some were sent independently upon the writer's own initiative. Some members did not send any letters, and some were written by salesmen without the knowledge or consent of the dealer by whom such salesmen were employed. There was no form of letter proposed by Losor, and each member acted independently in composing and sending such letters and telegrams. In encouraging dealer-members and their salesmen to cause letters and telegrams to be sent to officials of General Motors Corporation, Losor sought to bring the facts surrounding the discount house and referral service merchandising of Chevrolet automobiles to the attention of policy-making officials of General Motors in Detroit.

36. The problem of the use of discount houses and referral services as a regular practice by some Chevrolet dealers was first brought to the attention of the General Motors executives in Detroit charged with the responsibility of formulating distribution policy for all car divisions when, in November, 1960, said Central Office executives received a large number of

letters and telegrams from dealers and salesmen in the Southern California area. After investigating and reviewing developments in the use of discount house and referral service outlets throughout the United States, including obtaining a report from the Chevrolet Los Angeles Zone Office detailing the facts as then known regarding the practices in that area, the Corporation's policy concerning General Motors dealers' use of discount houses and referral services was formulated under the direction of the Vice President of General Motors in charge of distribution and approved by the President of the Corporation on or before December 14, 1960. Thereafter, between December 15 and 30, 1960, the policy was announced in substantially identical letters written to every General Motors automobile dealer in the United States including Cadillac, Oldsmobile, Buick and Pontiac as well as Chevrolet dealers. These letters expressed General Motors' opposition to arrangements by dealers with discount houses and referral services in light of the franchise system of distribution and the provisions of the General Motors Dealer Selling Agreements. Simultaneously, General Motors personnel were instructed to meet with each General Motors dealer in the United States to review such policy letter for the purpose of attempting to induce and persuade each General Motors dealer to refrain from entering into arrangements for the sale of new General Motors cars through discount houses and referral services in violation of the Dealer Selling Agreements.

37. The sole motivation for the announced policy and for the instructions given the General Motors personnel was the preservation of the General Motors franchise system, which the Dealer Selling Agreements were designed to effectuate. The General

Motors executives in Detroit regarded the arrangements made by dealers for the sale of new General Motors automobiles through discount houses and referral services as violative of their individual Dealer Selling Agreements. Said executives adopted the policy and issued the instructions to the General Motors personnel with respect to discount house and referral service arrangements on the basis of their long experience in the marketing of automobiles and their conclusion that the practice of the use by dealers of discount house or referral service outlets did not give General Motors the retail representation it needed and would in time result in the destruction of the General Motors franchise system.

38. In some instances, some of the complaining salesmen, and in one or two instances a dealer, complained in telegrams about the "cut rate" or "discount price" offered on sales by dealers through discount houses. The evidence in the record, however, does not indicate that General Motors at any time was concerned regarding the prices at which Chevrolet automobiles were sold since any dealer could sell at any price he desired to any customer anywhere.

39. In carrying out the instructions received from the General Motors Central Office, Chevrolet personnel met with each Chevrolet dealer in the Los Angeles Metropolitan Area individually and endeavored to induce and persuade each such dealer to refrain from the practice of selling new Chevrolets through discount houses or referral services. Consistent with longstanding General Motors policy, the Chevrolet personnel were not instructed to and did not threaten the termination of any dealer's Dealer Selling Agreement, but instead attempted to persuade each dealer to conduct himself in conformance with the obligations of the Dealer Selling Agreement.

40. On December 15, 1960, General Motors had already formulated its policy concerning General Motors dealers' use of discount houses and referral services. On said date Losor, Foothill and DSI representatives met for the first time with respect to the practice by some Chevrolet dealers of selling through discount houses or referral services. At that meeting, Losor dealers advised the representatives of Foothill and DSI of said practice and a committee representing the three defendant dealer associations was appointed to investigate the matter and report back at a later meeting. At said meeting, consideration was also given to advocating legislation which would regulate selling through discount houses and referral services.

41. During the early part of 1961 the three defendant associations, without any prior knowledge or request by General Motors, authorized an investigation to be made to determine if Chevrolet dealers in the Southern California Zone were in fact complying with the provisions of their respective Dealer Selling Agreements and the announced policy of General Motors Corporation pertaining to selling through discount houses and referral services. The investigation was also to be made to secure information to determine if sales made through discount houses or referral services were in compliance with the Motor Vehicle Code of the State of California in order that this information could be submitted to the California State Legislature then in session, in support of a bill to establish an Automobile Dealers Commission to license automobile dealers and their salesmen. Such investigation was made and in the course thereof shoppers were used and certain Chevrolet automobiles were purchased from Chevrolet dealers selling through discount houses.

42. After the commencement of said investigation, the three defendant dealer associations advised the Los Angeles Chevrolet Zone Manager that they were willing to make available to him the information obtained through the shoppers and he asked that they do so, believing that the employees of some Chevrolet dealers might be selling Chevrolet automobiles through discount houses or referral services without the dealer's knowledge. With such information he intended to go back to those dealers and endeavor to persuade them to conduct themselves in conformance with their obligations under the General Motors Dealer Selling Agreements relating to the use of discount houses or referral services as sales outlets. Between late February and early May 1961 the defendant dealer associations purchased seven new Chevrolets through discount houses. The defendant dealer associations supplied the Los Angeles Chevrolet Zone Manager with the name of each selling dealer and the record of each sale and at his direction the Zone Office personnel informed each dealer who had sold one of these shopped cars that the car had been sold through a discount house or referral service and asked said dealer whether he wished to repurchase the car. This was done as an effective method of bringing to the attention of the dealer the fact that his dealership was continuing to operate in violation of the Dealer Selling Agreement. In each instance the dealer repurchased the car.

43. In attempting to persuade General Motors to take some action to bring about the termination of the practice of some dealers of selling through discount houses or referral services and in bringing to the attention of General Motors information obtained by shoppers in 1961 that some dealers were continuing to sell through discount houses or referral services the

defendant dealer associations acted in furtherance of the interests of their dealer-members who were parties to Dealer Selling Agreements with General Motors which obligated all Chevrolet dealers to refrain from selling through discount houses or referral services. They did not act in combination conspiracy, or concert with General Motors. There was no agreement between the defendant dealer associations or any of them, and General Motors as to what action General Motors would take or whether General Motors would take any action at all with respect to the practice by some Chevrolet dealers of selling through discount houses or referral services.

44. There was no express or implied agreement between defendant associations or between any of them and any of their dealer-members that any of said dealer-members should refrain from selling through discount houses or referral services. At no time did any of the defendant dealer associations impose any sanctions or withdraw any association privileges from any member, director or officer of said associations engaged in selling through discount houses or referral services. At all times members of said associations who engaged in selling through discount houses or referral services, received all of the benefits of association membership including use of the information bureau to assist dealers in making exchanges of cars with other dealers, without restriction or discrimination of any nature and without any coercion or sanctions directed at such members by any of said defendant associations to compel them to discontinue such selling practice. Some of the dealers supplying the greatest volume of sales through discount houses and referral services were, in fact, elected officers and directors of the defendant associations during such period of time.

45. In attempting to persuade individual Chevrolet dealers in the Los Angeles Metropolitan Area to refrain from selling new Chevrolets through discount houses or referral services, and in accepting information as to shopped cars and offering them to the dealers who sold them in order to bring to the attention of such dealers the fact that their dealerships were continuing to operate in violation of the Dealer Selling Agreements, General Motors acted independently in furtherance of its own interests in procuring the conformance of individual Chevrolet dealers to the obligations of their Dealer Selling Agreements and thereby preserving the Chevrolet franchise system. General Motors had no agreement with its Chevrolet dealers other than the Dealer Selling Agreements and it had no agreement with any dealer association. Such action was taken independently and unilaterally by General Motors with respect to each Chevrolet dealer individually, to obtain compliance by each dealer with the obligations he had undertaken in his Dealer Selling Agreement and such action was not taken by General Motors by combination, conspiracy or concert of action with Chevrolet dealers or any of them or with defendants Losor, Foothill or DSI or any of them.

CONCLUSIONS OF LAW

1. The provisions of the Chevrolet Dealer Selling Agreements prohibiting Chevrolet dealers from transferring their sales obligations to others and from establishing a branch sales office without approval of Chevrolet were ancillary to a lawful plan adopted by Chevrolet for the competitive merchandising of Chevrolets and are reasonable. Said provisions are restrictions which promote competition between Chevrolet and its rival manufacturers, between Chevrolet dealers

and dealers in rival makes of cars and between Chevrolet dealers. These provisions do not constitute an unreasonable restraint of competition, are not contracts in unreasonable restraint of trade or commerce and do not violate Section 1 of the Sherman Act.

2. In each Dealer Selling Agreement, there is an implied obligation of good faith and fair dealing and that the parties will do nothing to affect adversely the objects of the agreement. Arrangements by a Chevrolet dealer with discount houses or referral services whereby they performed merchandising functions in the sale of the dealer's Chevrolet automobiles at business locations not approved by Chevrolet defeated the requirements of his Dealer Selling Agreement that the dealer not transfer his sales obligations to others and that he not establish branch sales offices without the approval of Chevrolet. Such conduct by a Chevrolet dealer constituted the doing of that which the dealer had agreed not to do directly and affected adversely the attainment of the objects of the Dealer Selling Agreement. Said conduct was violative of the obligations of the Chevrolet dealer under his Dealer Selling Agreement with Chevrolet. Said provisions of the Dealer Selling Agreement do not constitute an unreasonable restraint of competition, and are not contracts in unreasonable restraint of trade or commerce and do not violate Section 1 of the Sherman Act.

3. General Motors lawfully attempted to persuade and had the legal right to require Chevrolet dealers in the Southern California area to refrain from the practice of selling Chevrolets through discount houses and referral services and thus to conform to the provisions of their Dealer Selling Agreements.

4. General Motors acted solely in its own interests in including in its Dealer Selling Agreements the provisions prohibiting the transfer of the dealer's sales

obligations and the establishing of unapproved branch sales offices, in requiring its dealers to agree to such provisions as a condition of their franchises, and in seeking the conformance of all General Motors dealers to the provisions of their Dealer Selling Agreements. Although the fact of the increasing use by dealers of discount houses and referral services as sales outlets for Chevrolet automobiles was called to the attention of General Motors by Chevrolet dealers in the Southern California area, General Motors did not act jointly or in combination, conspiracy or concert of action with said dealers or with Losor, DSI or Foothill or in aid of said dealers, Losor, DSI or Foothill. General Motors acted independently and unilaterally as to each dealer individually and solely in its own interests in aid of its franchise system.

5. Since General Motors was legally entitled to enforce its Dealer Selling Agreements, its independent action was not changed into a combination or conspiracy because such action was requested by some dealers or defendant dealer associations or because some dealers or defendant dealer associations brought to its attention transactions which violated those contracts. To hold that a conspiracy arises where a person is requested by other persons to exercise his legal rights and he does so, would preclude legitimate communication between business organizations. The mere fact that General Motors brought about a result that was desired by some of the Chevrolet dealers is not sufficient to raise an inference of conspiracy.

6. Defendant General Motors, Losor, DSI and Foothill and the alleged co-conspirators did not engage in a group boycott of discount houses or referral services. The fact that General Motors and each of its Chevrolet dealers in the Southern California area had entered into a Dealer Selling Agreement by which

the dealer was restricted from transferring his sales obligations to others and from establishing branch sales offices at locations other than his place of business approved by Chevrolet and that the effect of such restrictions was to prohibit the dealer from entering into arrangements for the sale of Chevrolet cars through discount houses did not constitute a group boycott of discount houses or referral services. Said restrictions in each of said agreements were lawful and the fact that there was more than one agreement and that General Motors induced and persuaded all Chevrolet dealers in the Southern California area to abide by said restrictions in their agreements and that all said dealers abided by said restrictions did not constitute a group boycott by said dealers or by General Motors and said dealers or by any of defendants.

7. General Motors did not engage in any combination or conspiracy with defendants Losor, DSI or Foothill or with any of the alleged co-conspirators whether consisting of a continuing agreement, understanding or concert of action with said defendants or with alleged co-conspirators or otherwise to suppress or eliminate competition in the sale or distribution of Chevrolets in the Southern California area in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act, or otherwise.

8. Defendants Losor, DSI and Foothill did not engage in any combination or conspiracy with each other or with General Motors or with any of the alleged co-conspirators whether consisting of a continuing agreement, understanding or concert of action with or among said defendants or with said alleged co-conspirators, or otherwise, to suppress or eliminate competition in the sale or distribution of Chevrolets in the Southern California area in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act, or otherwise.

9. The Government's proof failed to support the allegations of its complaint.

10. Defendants are entitled to judgment that plaintiff take nothing by its action.

Dated: Sept. 14, 1964.

CHARLES H. CARR,
Judge.

Approved as to form as provided in Rule 7(a) of the Rules of the United States District Court for the Southern District of California.

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Attorney for Plaintiff.

Received copy of the within Findings of Fact and Conclusions of Law this 31st day of August, 1964.

MAXWELL M. BLECHER,
Attorney for Plaintiff.

APPENDIX C

United States District Court, Southern District of California, Central Division

Civil No. 62-1208-CC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION, DEFENDANTS

JUDGMENT

This cause came on regularly for trial on June 16, 1964, before the Honorable Charles H. Carr, Judge of the above-entitled Court and the issues having been duly tried and the Court having made its findings of fact and conclusions of law, NOW, THEREFORE, in accordance with said findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by this action.

Dated: Sept. 14, 1964.

CHARLES H. CARR,
Judge.

Approved as to form as provided in Rule 7(a) of the Rules of the United States District Court for the Southern District of California.

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Attorney for plaintiff.

Received copy of the within Judgment this 31st day of August, 1964.

MAXWELL M. BLECHER,
Attorney for plaintiff.

U.S. GOVERNMENT PRINTING OFFICE:1965